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An Address  
to the  
Vermont Bar Association  
Wednesday, January 2, 1918  
by  
WALTER GEORGE SMITH  
of Philadelphia  
(President American Bar Association)



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## EVENING SESSION

WEDNESDAY, JANUARY 2, 1918

The evening session was called to order at 8 p. m. by President Young in the Assembly Chamber of the State House; a goodly number of members of the Association and of the general public were present.

President Young: It is a source of regret that the severe weather has prevented many of our members from being present, and many others are closely occupied in assisting registrants on the legal advisory boards. It gives me great pleasure to be able to present to you as the speaker of the evening a gentleman I have had the pleasure of knowing for a number of years. He is, and has been for a long time, actively engaged in Bar Association work; a prominent member of the Pennsylvania and Philadelphia Bars, he has served in the capacity of president of the conference of Commissioners on Uniform State Laws, and for a number of years as chairman of the most important committee of that association—the Committee on Commercial Law—he has rendered very efficient and able service in promoting the improvement of jurisprudence throughout the country in recent years. It is, I believe, the first time for a good many years that this Association has had the honor and privilege of welcoming to our midst a president of the American Bar Association. The subject under discussion of his paper tonight is one in which we are all interested at this time—"War Legislation."

It gives me pleasure to present as the speaker of the evening the Honorable Walter George Smith of Philadelphia, who will now address you. (Loud and continued applause.)

Mr. Walter George Smith: Mr. President, your Honors, Ladies and Members of the Vermont Bar Association: It is somewhat arduous, travelling in your state at this season of the year; but I can assure you I have been amply rewarded. The able paper by your President this afternoon, followed by the very luminous address of the learned Chief Justice of your Supreme Court was a refreshment to me, not alone as a lawyer, but as an American. Those addresses gave evidence of a high ethical tone of the Bar and a thorough and conscientious desire on the part of the Bench that justice should be administered in accordance with the law.

In these days when public opinion sometimes seems to surge up against the ancient landmarks, it is indeed encouraging to find in this good old commonwealth that the true ideals of the lawyer and of the citizen are in such safe hands and I shall go back to my brethren of the American Bar Association and give them the assurance I have had from this visit here, that all is well with the Republic (applause) and will be well so long as the principles of local self-government are as tenaciously felt as in the State of Vermont today.

Of course the subject uppermost in all our minds, that tinges our thoughts and influences every fibre of our being is this great World War, and the relations of our own country towards it, and at the risk of going over well beaten paths I have chosen the subject of "War Legislation."

## AN ADDRESS TO THE VERMONT BAR ASSOCIATION

WEDNESDAY, JANUARY 2, 1918 BY WALTER GEORGE SMITH

OF PHILADELPHIA

(President American Bar Association)

## WAR LEGISLATION

The beginning of the New Year finds the greatest nations still in deadly war. Our own Republic, after more than two and one-half years of hesitation, was irresistibly drawn into the conflict. Perhaps it is yet too soon to anticipate the verdict of history as to the final causes, but it seems apparent that the predominant reasons for the catastrophe are to be traced to the opposition of two ideals. On the one hand, the non-moral Prussianized leaders of modern German thought reject with scorn the theory of democratic government, while on the other, all who consciously, or unconsciously, are striving to maintain the essential dignity of the individual man, are arrayed either actively or in sympathy in support of democracy. It has been well said that "There have been earlier crises out of which human fate proceeded in new directions; but the contestants in those conflicts understood only obscurely, if at all, the ultimate stakes for which they were fighting. We can plead no such ignorance. We know the issue and whither it leads." (William Roscoe Thayer.) If the mighty power which now threatens to engulf the ancient land of Europe and stretch its military and commercial empire from Berlin to Bagdad should succeed, it would reverse the progress made during two thousand years of effort towards the attainment of the Christian philosophy of government and abase the whole world

before the War Gods of Northern Paganism. The cruel selfishness of Thor and Woden would supplant the religion taught by the Divine Redeemer of mankind, a religion which however imperfectly it has been practiced by the masses of men has been the only real cause of those blessings which make civilized life as we know it at its best.

For forty years, under the guidance of their statesmen, their philosophers, their historians and their poets, the German people have learned a lesson of cruelty and hardness, while with a persistency and thoroughness unprecedented in history they have perfected the devilish enginery of destruction. Their armies of spies have sought out the hidden secrets of all nations and peoples. No art of treachery has been left untried as the complement of brutal force. From the great body of perverted intellect which has aided their propaganda that of Nietzsche stands out as perhaps the most effective. Thus he formulates their answer to the religion first preached by the Crucified:

"Ye shall love peace as a means to new wars and the short peace more than the long.

"Ye say it is the good cause which halloweth even war! I say unto you it is the good war which halloweth every cause. War and courage have done more great things than charity \* \* \*. Be not considerate of thy neighbor \* \* \*. What thou doest can no one do to thee again. Lo, there is no requital.

"Thou shalt not rob! Thou shalt not slay! Such precepts were once called holy \* \* \*. Is there not even in all life robbing and slaying? And for such precepts to be called holy. Was not truth itself thereby slain? \* \* \* This new table, oh my brethren, put I up over you: Become hard."

("Thus spoke Zarathrusta." Translated by Thomas Com-

mon, pages 52, 242, 243, 246 and 262. "Out of Their Mouths," pages 33 and 34.)

Whole volumes have been made up of such diabolism. The genesis and conduct of the present war have shown too well that the German people have been apt scholars. Where the tread of their columns has fallen they have left only marks of devastation. St. Jerome has been quoted as saying when the barbarian ancestors of these modern savages fell upon the Roman Empire, they left naught but earth and sky. Upon the sullen retreat of the Kaiser's armies from France, the earth itself was destroyed.

We need not dwell upon the atrocious incidents which have outraged every better human instinct, whether by the torture and murder of men, women and children, by bombardment of hospitals and undefended dwellings and school-houses, or the destruction of the noblest monuments of antiquity. It is patent that the civilized world has girded itself for a mighty struggle for the preservation of all that makes life worth living. Failure means the contemptuous overthrow of democracy and the enthronement of outworn tyranny. All that has been gained to mankind by four centuries of growth of the principle of self-government on the America continent is at risk, for it is fatuous to believe that a triumphant Prussian junkerdom would permit the continuance of the living protest against its iniquity embodied in our democratic republic. Though we are confident we should win in the end, it would be at heavy cost.

In this crisis of the world's affairs our national government is bending all of its powers to concentrate and mobilize our resources for effective action. Our soldiers are in France, our destroyers are coping with submarines, our young men are being drafted into the military and naval service and are training in

camp. Food and fuel, the great staples of foreign and domestic commerce, the transportation systems by land and water, are taken under government regulation. Direct and indirect taxes in many forms are levied, capital is invested in government loans and financial stability is tested by withdrawing from active business and from investments sums, the magnitude of which staggers the imagination. These are the obvious physical means for coping with an unprecedented peril, but there are other considerations and other means of even greater importance. In the language of one who is an active participant "This war has turned out to be not merely a military war. Its final decision will depend much more upon political, economical and psychological than upon merely military factors." (The Coming Victory, Gen. Smuts.) The outbreak of the war came with such suddenness as to find this nation unprepared in every way. We were so engrossed in our own domestic matters that we had followed with but little real interest the political and military plans of the Central Powers of Europe, though it required no spirit of prophecy during the past generation to foretell their outcome. Even after the invasion of Belgium and the tragedy of the Lusitania, there were large bodies of our people who still believed it possible to maintain our neutrality. Although our foreign population with a large part of those born of foreign stock and speaking and reading foreign languages and maintaining as far as possible a foreign attitude of mind, formed nuclei for disloyal plots, it was with surprise we witnessed the outcome in a wholesale destruction of life and property in pursuance of plans traced to the embassies of Germany and Austria, while we were still at peace. It may be doubted whether even now there is a thorough realization of the danger to our dearest ideals and interests from any relaxation of effort by any part of the community.



The national administration has made a special appeal to the lawyers of all the states to aid its efforts in making effective the conscription laws so that no injustice be done to any individual. The American Bar Association has responded by putting its Vice-Presidents, Local Councils and its entire membership in the various states at the disposal of their governors. It is not probable that these duties will impose onerous obligations on more than small groups; but there is a more general and more important duty that the American lawyers may and should perform each in his separate sphere and in the various organizations which give voice to professional opinion. It lies in making known the underlying rights and obligations of the citizens of the United States in war time, and especially in removing the false notions widely spread by malicious or ignorant men that the war measures of the government are without constitutional warrant and are therefore tyrannical and legally void. The nearest precedents for existing conditions are to be found in the events of the war for the Union from 1861 to 1865. They show the close analogy between the questions of constitutional power of the legislative departments of the Government in that crucial period and in this.

The late Chief Justice Agnew of Pennsylvania in an address delivered at Harrisburg in March, 1863, when civil war was flagrant, treats with his accustomed clearness the constitutional limitations of the power of Congress and of the President in peace and in war. Although his attention was especially directed to the power to suppress insurrection, his observations are apposite for existing conditions.

"Some of its (the Congress') powers relate to a state of peace," he says, "others to a period of war; and the fact first striking the attention of a jurist is that no correct exposition can be made of the latter in a frame of mind that looks alone to a state

of peace, before the clangor of arms has aroused its dormant energies. It must not be overlooked that as the war class rises, the peace class necessarily falls; not because they become extinct, but because the inherent vigor of the Constitution itself brings the war powers into play to meet the exigency and relaxes the latter to admit the free use and full scope of the former." After referring to the specific powers granted in Article I, Section XIII, with a special reference to the clauses relating to the military power, XI to XVI, he quotes clause XVIII of the Constitution authorizing Congress "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Whenever this clause has come before the court for interpretation, the great decision of Chief Justice Marshall in *McCullough vs. Maryland*, 4th Wheaton 312, has been the beacon. Although rendered in exposition of a peace power, it is not the less applicable to one relating to war. "We admit," he says in words often quoted "as all must admit that the powers of the Government are limited and that its limits cannot be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers that it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution and all means appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the spirit and the letter of the Constitution, are constitutional."

A recent commentator has summed up the trend of the decisions of the Supreme Court since the civil war, which have left

beyond the range of controversy what was too often disputed before that war, that the sovereignty of the national government is the fundamental premise from whatever angle we may approach the subject, whether it be administrative efficiency or the exercise of any other constitutional power. "In short," says this writer, "it may be stated as an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a state which shall be nationally and internationally a sovereign body and therefore that all limitations of the Constitution expressed and implied, whether relating to the reserved rights of the state or to the liberty of the individual, are to be construed as subservient to this one great fact." (Willoughby on the Constitution, p. 36.)

Therefore, just as President Lincoln was clothed with power and enjoined by his oath of office, as Judge Agnew pointed out more than one-half century ago, to use the whole military power of the Government to suppress domestic insurrection and to see that the laws be executed, so in these days by virtue of his authority as Commander-in-Chief of the Army in pursuance of congressional legislation, President Wilson in the exigency of foreign war is called upon to act in a similar way. The use of this great power rests upon the discretion of the President to an almost unlimited extent. "Congress," says Judge Agnew, "could not foresee all the movements and resorts of the enemy and those adhering to him; nor the embarrassment attending the measures to subdue him. A war of force from its nature knows no rule of action, nor how nor where the force must be used to meet the exigency." He then shows the difference between the state of Constitutional rights in time of peace and of war. In time of peace none can be taken away except by due process of law, but in time of war even the rights of life, liberty and property must

sometimes yield to inexorable military necessity. The citizen may be drafted into the military service, his property may be taken for public use. While it is sometimes said that this necessity overrides the Constitution, the learned judge shows that the Constitution in the clauses we have referred to itself recognizes the necessity of force, and Congress acts within constitutional limits in placing the force of the Nation in the power of the President.

"The injunctions of the Constitution and the Acts of Congress in pursuance are a grant of express, unlimited, unconditional authority to use the whole physical force of the Nation according to his own judgment in quelling traitors, their aiders and abettors, and compelling them to submit to the law; and \* \* \* this express grant without limitation for a purpose involving the very life of the Nation and the defense and preservation of the Constitution on every principle of law, logic, and necessity requires the exercise of all incidental powers necessary to the execution of the main purpose of suppressing the insurrection." He continues:

"The rights of the loyal also yield to the necessities of war. The law abiding citizen must shoulder his musket and lay down his life on the battlefield; his liberty is restrained by discipline; his property taken and destroyed for a military purpose."

And again "If then the stern necessity of war may demand the sacrifice of fundamental God-given rights, what exemption from the same necessity can be claimed for the minor guarantees of the Constitution? On what higher foundation rests the freedom of speech and of the press? They are but the outposts set to guard the higher rights of life, liberty and property."

This vigorous exposition of the executive power, if taken without consideration in the light of Supreme Court decisions

subsequently made, which it cannot be doubted would have met the approval of the distinguished jurist, might lead to the conclusion that by Act of Congress the President can be legally vested with the powers of a dictator and the safeguards imposed by the English law since Magna Charta be swept away whenever in the judgment of Congress the exigency of the public safety require the sacrifice. The consequences of such an interpretation of the Constitution would be too far-reaching for adequate description. At the first onset of war, defenses against arbitrary power won by centuries of struggle would fall like a house of cards. There were those who feared this danger in the dark days of the Rebellion when loyal states were honeycombed with treason and insidious attacks upon the Government within the lines were feared even more than the gallant foe who openly sought to disrupt the Union.

In 1866 there came before the Supreme Court of the United States the famous case of *ex parte Milligan* (4 Wal. 120). The petitioner in the court below, a citizen of Indiana, had been tried before a military commission for treasonable practices and had been sentenced to death by order of the commander of the department. The judges being divided in opinion as to the legality of this summary proceeding under martial law while the civil courts were open and there were no military operations carried on within the borders of the state, certified the question for decision to the Supreme Court. The proceedings had for their warrant the President's Proclamation of September 24, 1862, ordering:

"That during existing insurrection and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States and all persons discouraging volunteer enlistments, resisting militia draft, or guilty of dis-

loyal practices affording aid and comfort to rebels against the authority of the United States shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions.

“That the right of habeas corpus is suspended in respect to all persons arrested or who now or hereafter during the Rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by sentence of a court-martial or military commission.”

Obviously no cause involving graver consequences could be presented for decision. Counsel drawn from the leaders of the profession appeared on either side. For the petitioner Jos. E. McDonald, Jeremiah S. Black, James A. Garfield and David Dudley Field; for the Government, Attorney-General Speed, Henry Stanbery and Benjamin F. Butler. Their arguments exhausted the history of precedents, the philosophy of government in its relation to criminal trials and the long upward struggle for the individual rights of English speaking men. Counsel for the Government sought to minimize the safeguards of the 4th, 5th and 6th Amendments of the Constitution relating to unreasonable searches, due process of law and civil rights in trials for crime, in much the same language as that already quoted from Judge Agnew’s address:

“These in truth,” said Benjamin F. Butler “are all peace provisions of the Constitution and like all other constitutional and legislative laws and enactments are silent amidst arms when the safety of the people becomes the supreme law.” The trenchant words of Jeremiah S. Black, however, have found response in the minds of American lawyers everywhere as they did in those of the justices before whom they were uttered. “I think,” said he, “it is precisely in a time of war and civil commotion that we



should double the guards upon the Constitution. In peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage and goes surging up against the barriers which were made to confine it, we need the whole strength of an unbroken Constitution to save us from destruction." The opinion of the Court was delivered by Mr. Justice Davis. It was unanimous upon the main question involved, deciding that the military commission was without power to try the petitioner. The theory that necessity can abrogate any of the provisions of the Constitution was swept aside in emphatic terms. "The Constitution of the United States," said the Court, "is a law for ruler and people equally in war and in peace and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the Government within the Constitution has all the powers granted to it which are necessary to preserve its existence; as has been aptly proved by the result of the great effort to throw off its just authority \* \* \*.

"The laws and usages of war \* \* \* can never be applied to citizens in states which have upheld the authority of the Government, where the courts are open and their process unobstructed." The Chief Justice and Justices Wayne, Swayne and Miller while concurring with the majority of the Court, Nelson Grier, Clifford, Davis and Field made two reservations: "(1) When the right of habeas corpus is suspended, the Executive is authorized to arrest as well as to detain the suspected person; (2) There are cases

in which the privilege of the right being suspended, trial and punishment by military commission in states where civil courts are open may be authorized by Congress as well as arrest and detention."

Willoughby commenting upon the opinion of the Court in *ex parte Milligan* thinks it is too absolute for it to say, as it did, that "martial law cannot arise from a threatened invasion, the necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." He thinks it is correct to say that the necessity must be actual and present, but not that the necessity cannot be present except when the courts are closed, for, as the minority judges correctly point out, there may be urgent necessity for martial rule even when the courts are open." He concludes "That the better doctrine is to test the necessity for an act under martial law by its special circumstances." (Wil. on Const. Sec. 734.)

Ex-Justice Charles E. Hughes, in his recent address upon War Powers Under the Constitution, before the American Bar Association at Saratoga after making the same quotation, expresses the opinion that "Certainly the test should not be a mere physical one, nor should substance be sacrificed to form." One of the most learned commentators on the Constitution, the late Judge J. I. Clark Hare, felt that undue bounds had been given to the military power by the court after the civil war, notwithstanding the decisions of *Mitchell vs. Harmony*, 13 How. 115 and *ex parte Milligan* by the decisions in the cases of *Mitchell vs. Clark*, 110 U. S. 633, and *Coleman vs. Tennessee*, 97 U. S. 514.

He says "Despite the judgment in *ex parte Milligan* the Supreme Court \* \* \* recently countenanced the act of March 3, 1863, which virtually established martial law by arming the President and officers under his command with the dictatorial power



to deprive any man, whom they regard as inimical, of liberty and property. Agreeably to the 4th section 'Any order of the President or under his authority made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution civil or criminal \* \* \* for any search, seizure, arrest or imprisonment \* \* \* under and by virtue of such law or under color of any law of Congress.' This statute, he thought "operated as a declaration of martial law throughout the length and breadth of the United States \* \* \*. It is directly in the teeth of the principles laid down in *ex parte Milligan* and may hereafter serve as a foundation on which to rest government by the sword." (2 Hare Const. Law 983.) The decision in *Mitchell vs. Clark* is indeed hard to reconcile with *ex parte Milligan*. The military commander at St. Louis had expropriated for the military chest the rent of certain storehouses in the City of St. Louis. His order was deemed a sufficient defense to an action to recover these rents, in view of a statute passed by Congress imposing a statute of limitations fixed at two years. The court had had before it a similar question in *Bean vs. Beckwith*, 18 Wal. 510, where it was held that the defense applied solely to acts done under authority given specifically by the President, but in the case of *Mitchell vs. Clark* the act was done without such direct authority by order of the general in command. As was said by the Supreme Court in that case, "possibly in a few cases acts might have been performed in haste and in the presence of overpowering emergency for which there was no constitutional power anywhere to make good." Stating further, "that there can be no doubt of the power of the Congress to pass an act of indemnity."

Obviously in a time of war or insurrection acts which in time of peace would be a violation of private right, must be tested by the touchstone of necessity as was fully laid down by Chief

Justice Taney in *Mitchell vs. Harmony*. Firm ground was established by the case of *ex parte Milligan* however, and it cannot be doubted that its doctrine, with the necessary consideration of varying conditions of war, is authoritative.

It establishes that the Constitution in all of its parts is the ever living guide for the conduct of all branches of the government and no part either in peace or in war ceases to extend its beneficent protection. We may look with satisfaction upon the extraordinary and energetic response made by the Congress of the United States in its last extra session to the duties laid upon it by German aggression, feeling that the drastic measures taken for the protection of the country are all within constitutional limitations.

On April 6, 1917, war was declared in the following joint resolution:

"Whereas the Imperial German Government has committed repeated acts of war against the people of the United States:

"Resolved by the Senate and the House of Representatives that a state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be and he is hereby authorized and directed to employ the entire naval and military force of the United States and the resources of the Government to carry on war against the Imperial Government of Germany, and, to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States."

How well this solemn pledge has been carried out is being brought home to every citizen of the land. A summary of the legislation enacted since the memorable declaration of war, whatever may be the mistakes in detail and inequalities which experi-

ence may develop and which will doubtless be corrected, shows that it redounds to the credit of our national legislature both for its patriotism and its industry.

By the Act of June 15, 1917, the war powers are strengthened by the addition to the criminal code of provisions governing acts of espionage, giving information to the enemy, conspiring to injure property in foreign jurisdictions, unlawful use of the mails and interference with commerce by violence. By the same act the President is authorized in his discretion to lay an embargo on foreign commerce. By other acts the military and naval forces are increased and strengthened and their equipment provided for. The detention of our own vessels, internment camps and cognate subjects are regulated, including the seizure of foreign vessels and their use in the service of the United States. A bureau of war risk insurance for vessels is created and the seizure of enemies' property directed. By the act of August 10, 1917 "To encourage production, conserve the supply and control the disposition of food products and fuel, the President is given power to fix prices of necessities, forbid hoarding, take over factories, pipe lines, packing houses, mines, or plants, requisition food and supplies for army and navy, purchase, store and sell food, prescribe regulations for or wholly prohibit exchanges or boards of trade from carrying on operations, fix the price of wheat, forbid the distillation of spirits, regulate the manufacture and importation of malt or vinous liquors, fix the price of coal, regulate the sale or take over the plant, with all the necessary powers incident to the exercise of his discretion in these various directions, fixing heavy penalties upon those who seek to resist or avoid his orders.

With such powers legally in the hands of the Executive, our democratic form of government shows itself compact and effective. Our resources in men and material are at the command of

the President almost as completely as though we were an autocratic instead of a democratic nation, but with this vast difference: in an autocratic government such powers are inherent in the ruler, with us they will be ended by the same power which granted them. Meantime, the courts are always open and the humblest citizen is within their protection. Therefore it is that notwithstanding the inquisitorial power of the government, whether it be exercised in relation to taxation or the regulation of business or of the profession a power which has only begun to make itself felt in daily life, the patriotic devotion of the masses of our people rises higher day by day, as they realize the crisis in the world's history and the direful consequences of a failure to make good the pledges of our Congress. We are strongly resolved to yield everything demanded, to save democracy. The prescient wisdom of the founders of our constitutional system receives confirmation in every test and we may confidently believe we shall emerge from the present conflict with every safeguard of individual liberty unimpaired. (Applause.)

President Young: I am sure that I voice the very sincere appreciation of this Association for this address which has been so ably rendered. We all realize the great effort that weather conditions have imposed upon the speaker in coming here from Philadelphia at this time. He expected to reach here last night and had to spend yesterday in Springfield because his train was cancelled from there up. On behalf of this Association I extend to him our sincere thanks. (Loud and continued applause.)

At the time this program was prepared it was thought we might have a reception following the address, but in view of the coldness of the hall, and the general weather conditions it seems wise to omit that function. Consequently this closes the exercises of the evening. The next session will be at 10 o'clock to-

morrow morning after a brief session of the Supreme Court to receive a memorial to be presented to Mr. Webber.

(A brief informal reception was then had to afford members the chance to meet and greet Mr. Smith, and express individual pleasure afforded by the delivery of his able, interesting address.)

SECRETARY.

